JD-46-21
Wilmington, NC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WEST SHORE HOME, LLC

and **CASE 10–CA–260665**

MEDGAR LOVAN, an Individual

Jordan Wolfe, Esq., for the General Counsel.
Thomas G. Collins, Esq. **and** ***Sara Myirski, Esq.***
(Buchanan, Ingersoll & Rooney, PC), of
Harrisburg, Pennsylvania, for the Respondent.
Medgar Lovan, for the Charging Party.

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: On July 21, 2021, I heard this case by videoconference. After the parties rested, counsel presented oral argument, and on July 23, 2021, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Conclusions of Law and the recommended Order are set forth below.

Further Analysis

This case concerns the lawfulness of a rule that employees, while posting on Facebook or other social media, may not refer to or identify the Respondent's customers, vendors, or suppliers. Analyzing this rule using the framework set forth in *Boeing Co.*, 365 NLRB No. 154 (2017), I concluded that it was appropriate to weigh the impact of the rule on the employees' exercise of their Section 7 rights against the importance of the rule to the Respondent's

[1] The bench decision appears in uncorrected form at pages 47 through 66 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

legitimate business interests.[2] Based on the record in this proceeding, I concluded that such a balancing of interests is appropriate. No evidence suggests that the Respondent promulgated or applied the rule to interfere with or chill the exercise of Section 7 rights, and no evidence indicates that it has had that effect.

After a review of the bench decision and further analysis, I conclude that a reasonable employee, reading the rule in light of all the circumstances, would understand it to be less restrictive than the bench decision suggests. This conclusion does not affect the outcome of the case or my recommended Order, but it does require some further discussion.

The *Boeing* case presented a dramatic and clearcut example of a business justification outweighing a rule's impact on Section 7 rights. This defense contractor, building warplanes with advanced and sometimes secret technology, prohibited photography except under strictly controlled circumstances.

Not all cases present such a stark imbalance. Certainly, the present one does not. However, the Respondent had legitimate business reasons for the rule. During oral argument the Respondent's counsel stated:

> Our customer lists are confidential. Our vendors are confidential. Our business partners are confidential. But obviously we don't want them disparaged in the public domain, either. If an individual hires us to put a bathroom in, we don't want our employees jumping on a social media site and saying hey, Ms. Smith was such a jerk because, you know, she wouldn't give us a glass of water or let us use the, you know, master bathroom, or whatever. We have a legitimate interest in that.

If those who used social media were always paragons of politeness the Respondent's concern might seem overblown. However, the Internet has not occasioned an explosion of decorum.

Even a favorable comment can prompt a negative response, sometimes in harsh terms. Moreover, even favorable comments online diminish the privacy of a customer who simply doesn't want the publicity. A customer reasonably would expect that contracting to have a door installed or a kitchen remodeled would not expose him to public discussion.

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[2] In *Boeing*, the Board stated: "Under the standard we adopt today, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRB rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRB rights, *and* (ii) legitimate justifications associated with the rule. We emphasize that *the Board* will conduct this evaluation, consistent with the Board's 'duty to strike the *proper* balance between . . .asserted business justifications and the invasion of employee rights in light of the Act and its policy. . .'" 365 NLRB No. 154, slip op. at 3 (italics in original; footnote omitted).

The Internet has diminished privacy in some ways, making some formerly personal information more easily accessible than ever before. Certainly, customers have a legitimate interest in protecting against this new intrusion and preventing further erosions of the barrier separating public and personal.

Our society long has respected the sanctity of the home as a uniquely personal space and the law repeatedly has affirmed that someone in his home has legitimate expectations of privacy.[3] A homeowner who allows installers entry for the limited purpose of remodeling a kitchen very likely does not intend to give them permission to broadcast what they see, or their opinions about what they see, on the Internet.

The privacy interest protected by the Respondent's Guidelines clearly may not be as important as the interest served by the *Boeing* rule, prohibiting photography where advanced warplanes were being built, but it nonetheless serves a legitimate purpose. Moreover, it has very limited impact on the exercise of Section 7 rights.

The bench decision gives, as an example of protected activity which the rule would curtail, an employee's warning to other employees that there was an aggressive dog or some other hazard at a customer's house. The employee might wish to advise other workers to watch out for the hazard or discuss the adequacy of the Respondent's efforts to mitigate it. However, even in such a situation, the employee would have recourse to other means of communication, such as the telephone.

The bench decision notes that the Respondent's prohibition on referring to or identifying customers on social media does not distinguish between posts which the public can see and posts which only other employees can access. However, when employees read the rule, they reasonably would take into account its purpose. Nothing in the Guidelines suggests they were intended to prevent employees from warning each other about hazards.

To the contrary, employees reasonably would understand that the Respondent issued the Guidelines to protect information about customers from public disclosures which might violate a customer's privacy or subject the customer to embarrassment. So, I conclude that reasonable employees would be unlikely to understand the Guidelines to prohibit private discussions, among themselves, of actual risks, even if those discussions took place on social media channels, so long as only other employees had access to such communications. See *Bemis Co.*, 370 NLRB No. 7, slip op. at 3 (2020)("the rule clearly concerned communications

[3] For example, in *Georgia v. Randolph*, 547 U.S. 103, 115 (2006), the Supreme Court stated that "we hold to the 'centuries–old principle of respect for the privacy of the home,' *Wilson v. Layne*, 526 U.S. 603, 610 (1999), 'it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people.' *Minnesota v. Carter*, 525 U.S. 83, 99 (1998)(Kennedy, J., concurring)." These cases, of course, arise in a different context and involve a different potential threat to privacy, government intrusion rather than, as here, an individual publicizing private facts.

that could affect the *public's* view of the company. . ." [italics in original]).

Suppose, for analysis, that employees had reported a risk at a particular jobsite to management but were not satisfied with the Respondent's efforts to reduce the risk. Section 7 clearly would protect their right to inform the public. The Guidelines do not restrict their informing the news media, or picketing or handbilling. Therefore, it seems unlikely that reasonable employees would read the rule to prohibit any discussion online about management's response to their complaints. Rather, they reasonably would conclude that the Guidelines only barred them from referring to the customer by name or providing so much information about the customer's home that the public could identify it.

Additionally, the aggressive dog hypothetical is precisely that, a hypothetical situation more likely to appear on a law school professor's examination than in real life. Under the *Boeing* standard, to ascertain the meaning of a work rule, we look to how it would be understand by a reasonable employee, not by how it would be understood by an attorney whose mind had mutated because of long, unprotected exposure to the emanations of labor law. Likewise, I believe it is appropriate to give more weight to a rule's effect in ordinary life rather than in an imaginative hypothetical.

If homeowners came to fear that contracting with the Respondent could expose them to unwelcome publicity, they clearly could take their business to a competitor. By protecting its customers' privacy, the Respondent is furthering its own business interested. As stated in *David Saxe Productions, LLC*, 370 NLRB No. 103, slip op. at 3 (2021), the Respondent's legitimate interests in preserving its reputation and goodwill outweigh the potential impact of the Guidelines on the employees' Section 7 rights.

The Respondent's Guidelines also bar social media posts which identify the Respondent's vendors and suppliers. Such information obviously could be used by competitors.

In sum, for the reasons stated in the bench decision and above, I conclude that the Respondent's legitimate reasons for promulgating its Guidelines outweigh the very limited impact they might have on the employees' exercise of their Section 7 rights. Therefore, I further conclude that the Respondent did not violate the Act.

CONCLUSIONS OF LAW

1. The Respondent, West Shore Home, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent did not violate the Act in any manner alleged in the complaint.

On the findings of fact and conclusions of law herein, and on the entire record in this

case, I issue the following recommended[4]

ORDER

The complaint is dismissed.

Dated Washington, D.C. August 4, 2021

Keltner W. Locke
Administrative Law Judge

[4] If no exceptions are filed as provided by Section 102.46 of the Boar's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

APPENDIX A

West Shore Home
Case No. 10–CA–260655

Bench Decision

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations.

This case turns on the lawfulness of the Respondent's social media guidelines. Evaluating the allegedly unlawful language using the framework the Board set forth in *Boeing Co.*, 365 NLRB No. 154 (2017), I conclude that the adverse impact on Section 7 rights is outweighed by the Respondent's legitimate business justifications and, therefore, recommend that the complaint be dismissed.

Procedural History

This case began on May 21, 2020, when the Charging Party, Medgar Lovan, filed his initial charge in this proceeding, which was docketed as Case 10–CA–260665. On July 9, 2020, Lovan amended this charge.

After investigation of the charge, the Acting Regional Director for Region 10 of the Board issued a complaint and notice of hearing, which for brevity I will refer to as the "complaint." The Acting Regional Director issued the complaint pursuant to authority delegated by the Board's Acting General Counsel.

The Respondent filed a timely answer.

On July 21, 2021, a hearing opened before me by videoconference. As a matter of terminology, it may be noted that at the beginning of the hearing, the attorney representing the government bore the title of "counsel for the Acting General Counsel." However, on this same date, the United States Senate confirmed the appointment of the Jennifer Abruzzo to the position of General Counsel, so the title of the attorney representing the government in this matter is now "counsel for the General Counsel." For brevity, I will refer to her simply as the General Counsel or the "government."

Both the General Counsel and the Respondent appeared at the hearing through counsel. The Charging Party appeared as an individual. All had the opportunity to call witnesses and present evidence.

However, instead of calling witnesses, the parties submitted a stipulation of facts, which I received into the record. Counsel then presented oral argument. Then, I recessed the hearing until today, July 23, 2021, when it resumed for this bench decision.

Facts

Based upon the admissions in the Respondent's answer, and the stipulation received at hearing, I make the following findings:

I find that the Charging Party filed and served the charge as alleged in the complaint.

Further, I find that at all material times, the Respondent has been a limited liability company with an office and place of business in Wilmington, North Carolina, and has been engaged in the business of residential remodeling, specializing in windows, doors, and bathrooms.

Additionally, I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Having found that the Respondent falls within the Board's statutory jurisdiction, I further conclude, based upon the Respondent's admission of the commerce allegations in complaint paragraph 3, that it is appropriate for the Board to assert its jurisdiction in this case.

At all material times, the Respondent has maintained an "employee handbook" and required each employee to sign a document acknowledging receipt of it. All of the Respondent's employees have done so.

At all material times, this employee handbook has included a provision titled, "Social Media Guidelines," which for brevity will be referred to in this decision simply as the "Guidelines." The government alleges that certain portions of the Guidelines interfere with, restrain, and coerce employees in the exercise of rights guaranteed by Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

More specifically, complaint paragraph 6 quotes the allegedly offending language, which appears in the handbook under the heading, "Personal Use Guidelines." In pertinent part, this language states:

> Personal Use Guidelines:
>
> When publishing content as an individual on professional or personal channels, without express management approval, an employee may not:
>
> ! Refer to or identify any Company customers/clients, vendors, or business partners.

The Guidelines also include these definitions:

> *Professional Channels* - Non-Company branded social medial channels used by Company employees and personnel to engage as members of their professional communities. Content is conveyed as the employee's own thoughts and opinions, and not as the Company's official views. Examples include individual

employees' LinkedIn accounts, industry-focused blogs that may be of interest to customers, and comments posted under online news articles.

Personal Channels - Social media channels owned and used by Company employees and personnel for non-business and non-professional reasons. Examples include a personal Facebook page, a personal blog, a non-business, personal Twitter account, Instagram, Vine, YouTube channel, Periscope, etc.

The Guidelines also state that the Respondent's confidentiality, equal employment opportunity, and anti-harassment policies apply to all social media posts, "whether for Company or personal purposes."

Analysis

By alleging that the quoted portions of the Guidelines violate Section 8(a)(1), the government is claiming, in effect, that the language negatively affects employees' willingness to engage in activity protected by Section 7 of the Act. That section protects not only employees' rights to form, join or assist a labor union and to bargain collectively, but also their right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157.

It would lengthen this decision considerably, and needlessly, to describe, or try to describe all the different activities which constitute such "other concerted activities" and which fall within the protection of Section 7. In general, and with certain exceptions, they include discussions of wages, hours and working conditions by two or more employees, and appeals to the public to put pressure on an employer to improve working conditions.

As technology has evolved, so have the ways employees communicate their concerns about wages and working conditions. They include not only picketing and handbilling but communications through radio and television and, most recently, through the Internet and social media. Of course, social media allow employees not only to complain to the public about wages and working conditions, but also to discuss such matters among themselves. Similarly, social media provide new ways for employees to discuss among themselves whether or not to unionize.

The government alleges that the Respondent's social media policy, as quoted in the complaint, reasonably would make employees less likely to engage in protected activities online or make such activities more difficult. To analyze these allegations, I follow the framework the Board set forth in *Boeing Co.*, 365 NLRB No. 154 (2017), as further refined in *L. A. Specialty Produce Co.*, 368 NLRB No. 93 (2019), and later cases.

In *Boeing*, the Board described the different categories of work rules, but it also stated that these categories were not part of the analysis itself. In other words, after the analysis has been completed and it has been determined whether the rule in question was lawful or unlawful, then it can be placed in a category based on that determination.

Therefore, I do not begin this analysis with a description of the three categories but instead will start by discussing the framework itself. At the outset, it should be stressed that the Board examines the work rule or policy from the perspective of how a "reasonable employee" would understand it. More specifically, the Board determines the meaning of the rule as it would be understood by "an objectively reasonable employee who is 'aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRB.'" *L. A. Specialty Produce Co.*, above , 368 NLRB No. 93, slip op. at 2, quoting Member Kaplan's observation in *Boeing*, 365 NLRB No. 154, slip op. at 4 fn. 12.

In *Boeing*, the Board cautioned that in examining a work rule, particular phrases should not be read in isolation and that improper interference with employee rights should not be presumed. From the *Boeing* decision, it is clear that where a work rule or policy does not specifically refer to activities protected by Section 7, the judge should not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted in that way.

As the Board stated in *L. A. Specialty Produce*, "a challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Section 7 activity, or because the employer failed to eliminate all ambiguities from the rule, an all-but-impossible task." 368 NLRB No. 93, slip op. at 2.

The Board does not require testimony from an employee concerning how he or she actually understood the language. Rather, applying an objective standard, the Board itself determines how a reasonable employee would interpret the rule or policy.

As the *L. A. Specialty Produce* decision noted, in cases before *Boeing*, set a new standard, the Board had "outlawed rules and policies based on its judgment that such rules could have been written more narrowly to eliminate potential interpretations that might conflict with the exercise of Section 7 rights—interpretations that might occur to an experienced labor lawyer but that would not cross a reasonable employee's mind." 368 NLRB No. 93, slip op. at 1–2.

Under the *Boeing* framework, at the outset, the General Counsel must carry the initial burden of proving that such a reasonable employee would interpret a rule or policy in a way which potentially interfered with the exercise of Section 7 rights. If the government fails to carry this burden, then the rule is lawful and the analysis ends.

However, if the General Counsel does satisfy this initial requirement, then the analysis goes to the next step, which involves a balancing test. On one side of the scale is the extent of the rule or policy's potential interference with the exercise of Section 7 rights. On the other side of the scale is the employer's legitimate justification for the rule.

In the present case, the Respondent states that it intended the rule to prevent sensitive business information about its customers, clients, vendors, and business partners from being disclosed to the public. Such a disclosure obviously would create risks, both that the information might benefit competitors and that its disclosure might harm or offend customers.

However, I need not consider the Respondent's business justification for the policy at this stage of the analysis. Rather, I first must determine whether the General Counsel has carried her initial burden of showing that a reasonable employee would interpret the policy in a way which potentially interfered with the exercise of Section 7 rights.

In determining how a reasonable employee would understand the policy, I start with the plain meaning of the words that, according to the complaint, interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Then, I will consider whether other provisions in the employee handbook change this meaning. Further, I will take into account all other relevant circumstances, because a reasonable employee would not read the words "in a vacuum" but rather in the context of anything else which had been written, said or done which would affect the meaning of the text.

The text itself conveys an absolute, unequivocal prohibition: An employee may not, without express management approval, refer to or identify any company customers, clients, vendors, or business partners when the employee posts content online. This language includes no qualifications or exceptions.

Without doubt, this prohibition affects employees' exercise of their Section 7 rights. As the Board stated in *Motor City Pawn Brokers Inc.*, 369 NLRB No. 132, slip op. at 5 (2020), , "employees have a Section 7 right to discuss among themselves, and with the public, information about their terms and conditions of employment for the purpose of mutual aid and protection. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978)."

As the Respondent has stipulated, it is engaged in the business of residential remodeling, specializing in windows, doors, and bathrooms. The Respondent's employees necessarily perform this work at the homes of the Respondent's customers. The work cannot be performed anywhere else.

Employees' conditions of employment necessarily depend on and include where they do the work. It is not overly academic or speculative to conclude that employees discussing conditions of employment would want to be able to state where the work took place. For example, consider a remodeling project that required weeks, if not months to complete, in a residence guarded by a large and aggressively territorial dog.

Employees might well wish to discuss this condition of employment and such a discussion reasonably would include the location of the project. Significantly, the Respondent's Guidelines do not distinguish between a social media post which only certain specified people can access, and a post open to all readers.

The prohibition does begin with the words "when publishing content" and, arguably, the word "publish" indicates that the text would be made public, not merely communicated to a select few. However, although a lawyer might construe the word so narrowly, a reasonable employee likely would not.

Moreover, the text continues "as an individual on professional or personal channels . . ." An employee reading the words "personal channels" reasonably would believe that the prohibition extended to posts which only those he designated could see.

The Guidelines define "personal channels" to be social media channels "owned and used by company employees and personnel for nonbusiness and nonprofessional reasons. Examples include a personal Facebook page, a personal blog, a nonbusiness, personal Twitter account, Instagram, Vine, YouTube channel, Periscope, etc." This definition does not distinguish between posts which are accessible only to selected individuals and posts which the public can see. An employee reasonably would understand that the Guidelines applied to any post, regardless of how many other people could see it.

Thus, the Guidelines would deter an employee from using a social medium—even a private one with access limited to designated individuals—to discuss a condition of employment arising at a particular jobsite. Such a limitation is significant because not all of the Respondent's employees would be working at that jobsite and the most convenient method of reaching them might well be through a social medium.

It should be emphasized that employees may wish to discuss other conditions of employment, such as a safety hazard specific to one customer's jobsite, and Section 7 of the Act protects their right to do so. Prohibiting them from using social media, even when access is restricted, significantly impairs the exercise of this right.

Additionally, as noted above, employees also have the right to make the public aware of their dissatisfaction with terms and conditions of employment. It might be argued that employees could complain to the public about working conditions without specifically naming a particular customer. However, the Guidelines provide that employees may not "Refer to *or* identify any Company customers/clients. . ." (Emphasis added.) Thus, the rule prohibits a reference to a customer even if the customer is not identified.

Social media provide one of the most convenient and least expensive ways of communicating to a large audience. Therefore, a rule restricting employees' use of such fora has the potential of significant interference with exercise of their Section 7 rights.

However, as already noted, to determine how a reasonable employee would interpret the allegedly offending language, those words cannot be considered in isolation. Other portions of the Respondent's social media guidelines may well affect how the words are understood.

The Respondent's Guidelines also include a "savings clause." It states: "This Policy does not prohibit employees from discussing the terms and conditions of their employment with those who have a legitimate interest." Even though the Guidelines provide definitions of some terms, they do not define "legitimate interest."

Labor lawyers, of course, might reason that, because the Act protects employees' right to discuss terms and conditions of employment with each other and with the public, then the fellow employees and the members of the public must have a "legitimate interest." However,

another lawyer might point out that the word "interest" typically signifies a greater stake than that of a casual observer. So, even attorneys might argue about what constitutes a "legitimate interest."

But the Board judges the lawfulness of the language based upon how a reasonable employee would understand it. Such an employee likely would not construe the language in the savings clause to allow communications on social media which otherwise would be prohibited.

The Respondent argues that another policy in the employee handbook, the "Confidentiality Policy," affects how employees would understand the allegedly unlawful language in the Guidelines. The Confidentiality Policy states:

> Our clients and other parties with whom we do business entrust the Company with important information relating to their businesses. It is our policy that all client information considered confidential will not be disclosed to external parties or to employees without a "need to know." If an employee questions whether certain information is considered confidential, the employee should first check with his or her immediate supervisor. This policy is intended to alert employees to the need for discretion at all times and is not intended to inhibit normal business communications.

The Respondent's prehearing brief notes that this confidentiality policy, and also the "savings clause," appear in the employee handbook before the allegedly unlawful language. The handbook also states that "[t]he Company's Confidentiality, Equal Employment Opportunity, and Anti-Harassment policies apply to all social media posts, whether for Company or personal purposes." The Respondent's brief argues that when "these handbook provisions are read in concert, as they should, it is clear that the disputed language would only prohibit the disclosure of confidential information related to customers/clients, vendors, or business partners."

For analysis, I will assume that a reasonable employee read all of these provisions together. However, I cannot conclude that the reasonable employee, thus informed, would consider the confidentiality policy to limit the application of the allegedly unlawful language, which prohibited employees from either referring to or identifying the Respondent's customers.

This policy does not define the meaning of the term "information considered confidential" but instead instructs that an employee should resolve any doubt by first checking "with his or her immediate supervisor." The language clearly communicates that it is management's prerogative to determine what information is confidential. Management also issued the instruction, in the employee handbook, that an employee may not, on social media, refer to or identify any company customers or clients. In the absence of a definition of what constituted "information considered confidential," an employee reasonably would conclude that management therefore considered the identities of the customers confidential.

The Respondent cites *Argos USA LLC d/b/a Argos Ready Mix, LLC*, 369 NLRB No. 26

(2020), but in that case, unlike the present one, the confidentiality agreement did offer a definition which made clear that the policy applied only to that respondent's proprietary business information. The Respondent also relies on *Motor City Pawn Brokers, LLC*, 369 NLRB No. 132 (2020), but in that case, the documents setting forth the confidentiality rule described what types of information were considered confidential. An employee informed by this sort of explication reasonably would consider the prohibition more limited. The absence of such explanatory material in the present case distinguishes it from those cited by the Respondent.

No other language in the employee handbook, and no other circumstances, would mitigate the effect of the Guidelines language alleged to violate the Act. The Respondent cites *Newmark Grubb Knight Frank*, 369 NLRB No. 121 (2020), for the principle that the judge should not selectively quote just a portion of a policy but should consider all of it. That is certainly true.

However, I conclude that a reasonable employee who read all of the employee handbook and considered its provisions together, would understand the allegedly unlawful language to prohibit him from referring on social media to any of the Respondent's customers. Such a limitation significantly constricts the exercise of Section 7 rights.

Other cases cited by the Respondent similarly reflect the principle that certain provisions of a rule or policy should not be read in isolation but instead should be considered together with other relevant provisions. That principle is not in doubt, but in the specifics of this case, those other provisions would not significantly change how the reasonable employee understood the allegedly unlawful language.

In sum, I conclude that the General Counsel has carried the government's burden of showing that the Guidelines potentially interfere with the exercise of Section 7 rights. Therefore, this analysis continues to the second step, a balancing of the potential interference against the legitimate justifications for the policy.

As the General Counsel noted during oral argument, the Respondent has not advanced the sort of compelling reasons given by the employer in *Boeing Co*. That employer, a defense contractor entrusted with military secrets, had security concerns affecting not only its corporate interests but also the national interests.

The Respondent's brief offers two business justifications, "protecting the identity of West Shore's customers/clients, vendors and business partners as confidential business information, and further protecting such individuals from unnecessary disparagement."

At this stage of the analysis, I must weigh the importance of the asserted business justification against the extent of how substantial and significant are the limitation on employees' Section 7 rights. The Respondent has not explained what harm it fears will occur if the public learns the names of its customers.

When the Respondent's employees are working at a residence, is a van or truck bearing

the Respondent's name parked on the customer's driveway or in front of the customer's home? Or do the Respondent's employees arrive in unmarked vehicles and park them some distance away?

The record does not answer those questions. However, if the Respondent went to extraordinary lengths to keep the identities of its customers secret, would it not make sure the evidence reflected that fact? Arguably, some customers might have a reason to request anonymity, but it is difficult to believe that all of them would.

Absent evidence to the contrary, I must conclude that the Respondent's interest in keeping all of the names of its customers confidential is not that compelling, at least compared to the strong business justifications asserted in *Boeing Co*.

The Respondent also argues that it needs the allegedly unlawful language to protect its customers from "unnecessary disparagement." By "disparagement," the Respondent appears to mean disparagement of the customer rather than disparagement of its own services. The Board has upheld the lawfulness of rules prohibiting the disparagement of an employer's own product of services. See, e.g., *Medic Ambulance Service, Inc.*, 370 NLRB No. 65, slip op. at 4–5 (2021). A rule prohibiting the disparagement of a customer serves a legitimate and important business interest and likewise would be lawful.

It is more difficult to judge the importance of such a rule to the Respondent's business. The record does not establish that such disparagement actually occurs or, if it does, how often. The Respondent also does not explain why a rule simply prohibiting disparagement would not suffice.

At the same time, it should be recognized that the Respondent's asserted justifications are not frivolous. It is wholly legitimate for a company to wish to protect its customers from adverse publicity.

Let us place the Respondent's legitimate justifications on one side of the scale and the impact of the allegedly unlawful language Section 7 on rights on the other side. Although the prohibition does negatively affect the exercise of Section 7 rights, it does not strike at the heart of those rights.

In my view, the two sides almost balance each other out. It is a close call.

However, I conclude that the contribution the Guidelines make to furthering the Respondent's business interests slightly outweighs the rather slight harm the Guidelines cause to the employees exercise of Section 7 rights. Therefore, I conclude that the Guidelines are lawful.

Having concluded that the language described in complaint paragraphs 6 is lawful, I will now place it in one of the categories first described in *Boeing* and elaborated in later cases. The first category can be divided into two subcategories, the first containing rules which, when reasonably interpreted, do not prohibit or interfere with the exercise of rights under the Act.

The second subcategory consists of rules which are lawful because the business justification outweighs the adverse impact on protected rights.

The language quoted in complaint paragraph 6 falls into this second subcategory.

The other two categories set forth in *Boeing* do not apply in this case.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, and the Order. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.